

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

**CAKE LIFE BAKE SHOP, LLC
Employer**

and

Case 04-RC-253677

**CAFE WORKERS UNITED
(FISHTOWN LOCAL 1)
Petitioner**

**REGIONAL DIRECTOR'S DECISION ON
OBJECTIONS AND CHALLENGED BALLOTS**

This Decision determines the eligibility of five challenged ballots and the Petitioner's objections to the election. Petitioner and Cake Life Bake Shop, LLC (Cake Life or Employer) signed a stipulated election agreement setting forth the bargaining unit as all full-time and regular part-time baristas, dishwashers, pastry employees, and cake employees at its retail bakery and café. Five employees voted subject to challenge because the Petitioner and the Employer disagreed on their inclusion in the stipulated unit. The Petitioner seeks to exclude Director of Custom Sales Chloe Weaver, Custom Sales Coordinator Jessica Carreira, and Marketing and Special Events employee Kathryn Clark Legazpi on the basis that they do not share a community interest with this bargaining unit and because Weaver is a statutory supervisor. Additionally, Petitioner argued for the first time during its closing argument at the hearing that Weaver and Legazpi should be excluded from the stipulated unit because they are managerial employees. The Employer sought to exclude Pastry Chef Anaya Johnson and Assistant Manager Domanique Gregory because they are statutory supervisors. For the reasons discussed below, I affirm the Hearing Officer's recommendations to overrule the challenges of all these ballots. I conclude that Weaver, Johnson and Gregory are not statutory supervisors, that Weaver, Carreira and Legazpi share a community of interest with the bargaining unit and that Weaver and Legazpi are not managerial employees.

In addition to the challenged ballots, the Petitioner filed two objections to conduct affecting the results of the election. Neither party filed Exceptions to the Hearing Officer's recommendation on Objections nor filed Exceptions to the Hearing Officer's recommendation to overrule the challenged ballots of Jessica Carreira, Anaya Johnson, and Domanique Gregory. As I affirm the Hearing Officer's recommendations with respect to the challenged ballots, I order that the five ballots be opened and counted and that a revised tally of ballots be issued. I also affirm the Hearing Officer's recommendation and adopt her findings to overrule Petitioner's Objection 1 and sustain Petitioner's Objection 2. If a revised Tally of Ballots shows that the Petitioner received a majority of the ballots cast, the Petitioner should be certified as the exclusive bargaining representative for the appropriate unit. In the alternative, if the revised Tally of Ballots shows that the Petitioner did

not receive a majority of ballots counted, I affirm her recommendation that the January 22, 2020 election be set aside, and a rerun election be ordered.

PROCEDURAL HISTORY

The Petitioner filed a petition in Case 04-RC-253677 on December 20, 2019. Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director on January 2, 2020, an election by secret ballot was conducted on January 22, 2020 in the following unit:

Included: All full-time and regular part-time baristas, dishwashers, pastry employees, and cake employees employed by the Employer at its Philadelphia, Pennsylvania facility

Excluded: All other employees, office clericals, managers, guards and supervisors as defined in the National Labor Relations Act.

The Tally of Ballots prepared at the conclusion of the election on January 22, 2020 showed that of approximately 27 eligible voters, 10 ballots were cast for and 9 ballots were cast against Petitioner, with 5 challenged ballots determinative of the election results.

On January 29, 2020, the Petitioner filed timely objections affecting the results of the election. A Notice of Hearing was issued on January 31, 2020 on the Challenged Ballots and Objections to the Election. A hearing was held before Hearing Officer Marilu Arent on February 21 and 24, and March 2, 3, and 9, 2020 on the Challenged Ballots and Objections to the Election. All parties were afforded the opportunity to be heard, to present evidence, and to examine and cross-examine witnesses. The parties agreed to not file post-hearing briefs.

On June 11, 2020, the Hearing Officer issued her Report and Recommendations on Challenges and Objections to Election. The Hearing Officer determined that the five challenged ballots should be overruled and that all five challenged ballots be opened and counted. With respect to the two objections, the Hearing Officer overruled Petitioner's Objection 1 but sustained Petitioner's Objection 2.

On June 25, 2020, the Petitioner filed timely Exceptions to the Hearing Officer's Report and Recommendations and Brief in Support of Exceptions. On July 2, 2020, the Employer filed its Opposition to the Union's Brief and Exceptions to the Hearing Officer's Report. The Petitioner filed nine Exceptions asserting that: (1) there is no evidence supporting the Hearing Officer's contention that Petitioner intended to include Chloe Weaver in the unit; (2) the Hearing Officer erred by refusing to consider Petitioner's challenge to Weaver and Kathryn Legazpi as managerial employees; (3) the Hearing Officer erred by failing to find that Weaver and Legazpi were managerial employees; (4) the Hearing Officer erred by not finding Weaver to be a statutory supervisor; (5) that the Hearing Officer erred by not finding that Weaver possessed supervisory authority under Section 2(11) of the Act; (6) the Hearing Officer erred by finding that Weaver did not exercise supervisory authority; (7) the Hearing Officer erred in finding that *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001) and *Pepsi-Cola Co.*, 327 NLRB 1062 (1999) were inapplicable to this case; (8) the Hearing Officer erred by finding that Weaver and Legazpi had a community of interest

with bakers, baristas, and dishwashers; and (9) the Hearing Officer erred in finding that the Board's rule covering service of offers of proof in support of objections privileged the employer to serve a redacted copy of its position statement on challenges. No Exceptions were filed to the Hearing Officer's recommendation to overrule the challenged ballots of Jessica Carreira, Anaya Johnson, and Domanique Gregory and for Hearing Officer's recommendation on Objections.

SUMMARY OF FINDINGS

The Hearing Officer discharged her duty under Sec. 102.64(a) of the Board's Rules and Regulations to "inquire fully into all matters in issue and necessary to obtain a full and complete record" and to prepare a report containing findings of fact and recommendations on the issues as required under Sec. 102.69(c)(1)(iii). I find that the Hearing Officer has fully satisfied these requirements and that the Report contains no prejudicial errors. The relevant facts set forth in the Hearing Officer's Report are supported by the evidence obtained during the hearing and the Hearing Officer properly applied applicable Board case law. As set forth below, I have decided to adopt the Hearing Officer's recommendations and to dismiss the Petitioner's Exceptions. Thus, in agreement with the Hearing Officer, I find that (1) the Hearing Officer did not err by refusing to consider Weaver and Legazpi as managerial employees, (2) the Hearing Officer correctly found that Weaver was not a statutory supervisor and she did not possess or exercise supervisory authority; (3) the Hearing Officer correctly interpreted the applicability of *Fred Meyer* and *Pepsi-Cola*; (4) the Hearing Officer correctly found that Weaver and Legazpi shared a community of interest with the bargaining unit; and (5) the Hearing Officer properly overruled Petitioner's Motion to Preclude the Employer from presenting evidence in support of its election challenges.

In the absence of exceptions to the challenged ballots of Carreira, Gregory and Johnson and based on my review of the record and applicable law, I agree with the Hearing Officer and adopt her findings and recommendations that these challenges be overruled. Accordingly, I am ordering that the challenged ballots of Chloe Weaver, Kathryn Legazpi, Jessica Carreira, Anaya Johnson and Domanique Gregory be opened and counted, and a revised Tally of Ballots issue. In the absence of exceptions to the Objections and based on my review of the record and applicable law, I agree with the Hearing Officer and adopt her findings and recommendations that if a revised tally of ballots shows that Petitioner received the majority of ballots cast, the Petitioner should be certified as the exclusive bargaining representative. In the alternative, if the revised Tally of Ballots shows that Petitioner failed to obtain a majority of ballots cast, I order that the election be set aside, and a rerun election be held.

DISCUSSION

1. Background Facts

Nima Etemadi and Lily Fischer have owned and operated Cake Life, a retail bakery and café in Philadelphia, Pennsylvania since 2017. Cake Life employs about 28-30 employees who work in the “front-of-house,” the “back-of-house,” in Custom Program, or in Marketing and Special Events. Christine Tomasco is the Front-of-House Manager who oversees the daily operations of the store and supervises around 10 baristas who mainly work in the “front-of-house” area serving customers specialty coffee drinks, drip beverages, and baked goods prepared on-site. Baristas also answer phone calls, take cake orders for the pre-determined “cake of the month,” and bus tables used by customers or after cake tastings in the front of the store. Domanique Gregory works as a barista and as Tomasco’s Assistant Manager. The “back-of-house” is comprised of roughly 14 employees working on the pastry team, cake team or as dishwashers. Rebecca Craig is Head Pasty/Cake Chef overseeing the cake team that produces cakes and cupcakes for the café bakery and custom orders. Raina Beresniewicz is Head Pasty Chef overseeing the pastry team; Anaya Johnson is the lead baker on the pasty team. Due to space constraints in the kitchen, the pastry team works from 4:00 a.m. until 12:00 p.m. and the cake team works from 12:00 p.m. until 8:00 p.m. The front and back of house employees work Tuesday through Sunday, at varying times and days; the Employer’s facility is closed on Mondays.

Weaver was hired as the Director of Custom Sales in September 2018, and Jessica Carreira was hired as Custom Sales Coordinator in May 2019; they are the only employees working in the Custom Program which handles custom cake and pastry orders. Weavers works Tuesday through Saturday, from 10 a.m. until 6:00 p.m.; Carreira works Wednesday through Sunday. Despite Weaver’s title, she signs her emails to clients as Wedding and Custom Cake Coordinator. Weaver works in tandem with Jessica Carreira to handle 30-60 custom cake orders weekly. They work with clients from the initial consultation (including cake tastings), to sketching and designing the custom cakes, through production and delivery of the final product. Weaver and Carreira regularly consult Head Cake Chef Rebecca Craig to ensure that Cake Life can make and produce the custom cake within the client’s prescribed time-frame, including cake design, type of cake, cake height, and flavorings inside the cakes. Craig trained Weaver and Carreira to know and understand all aspects of Cake Life’s products, including the variety of cake products, the various buttercreams, and which flavors accentuate which type of cakes. Craig also provided them with a “cheat sheet” of costs associated with the cakes. Weaver and Carreira regularly interact with cake team employees who must bake and decorate the custom cakes or cupcakes off their designs. Custom cake orders are placed in the Employer’s Google calendar system. There is no assignment method regarding custom cake orders; they are handled equally between Weaver and Carreira depending on their workload and availability, except Weaver handles all cake tastings and custom orders for the Ritz Carlton account. Although Weaver and Carreira primarily work in an office upstairs next to the break room, they perform wedding cake tastings in front-of-house and work with bakers in back-of-house.

Weaver came to Cake Life with an artistic background that has allowed her to decorate cakes with fondant, fresh flowers, or painting gold leaves. Weaver is the only person Craig entrusts

to write calligraphy on cakes, which entails painting with a paint brush and food coloring instead of writing in buttercreams or chocolate. Fondant and cake writing are performed by bakers or decorators-in-training on the cake team. Similar to Weaver, Carreira has also worked in the back-of-house along with the cake team. She has trimmed and soaked cakes, filled cakes, weighed sifted ingredients for batters and frosting, and opened cans of sweetened condensed milk.

Kathryn Clark Legazpi began working in customer sales at Cake Life in June 2018, including handling the Ritz Carlton account (until Weaver took over the account); she transitioned to Cake Life's Marketing and Special Events employee in August or September 2019. Legazpi works from home on Mondays and works at the Employer's facility Tuesday through Friday, from 9:00 a.m. until 5:00 or 6:00 p.m. Legazpi's background as a former pastry chef has helped her to promote Cake Life's products. She knows and understands how kitchens operate, how products are made and designed, and how certain products will tolerate different temperatures. She maintains the Employer's social media accounts and website, promotes special events, takes and archives photos for promotional events, assists with tablescapes for events or photos, assists baristas in making specialty promotional drinks or menus, and consults with pastry and cake employees to potentially promote different types of baked goods. Legazpi consults with Beresniewicz, Craig or Tomasco to determine what types of specialty products can be offered at promotional or special events. Legazpi works with the bakers on the pastry and cake team to gather information on the products before taking photos. Legazpi also works with baristas to set up photo shoots for pasty items or specialty drink items, or works with baristas and Tomasco to promote a specialty drink or a different First Friday specialty item. Legazpi has also assisted Weaver and Tomasco with seasonal décor at the front-of- house.

Legazpi, like Weaver, has many other roles at the Employer's facility and fills in wherever she is needed. She answers phone calls in the office or in the front-of-house when baristas are busy and performs baking duties in the back-of- house, especially during the traditional "Hallmark" holidays. Cake Life's busy period runs from Valentine's Day through Spring wedding season with a respite in July, but business picks up again with weddings in August and September, followed by the busy fall season beginning in October through the Christmas holiday. Legazpi's baking duties include scooping cupcake batter, baking off cupcakes, weighing ingredients, making frostings, turning out cheesecakes and flourless cakes, and trimming cakes. Weaver, Carreira and Legazpi have all helped throughout the busy seasons wherever they are needed, including packing boxes with baked goods alongside baristas, bagging items for corporate orders, and making deliveries. With an "all hands on deck" philosophy, the dishwashers have also helped deliver items during busy times.

The Employer has weekly management meetings attended by Etemadi, Fischer, Craig, Beresniewicz, Tomasco, Weaver, and Legazpi. The meetings discuss production information, special events, holiday preparations, or delegation of assignments among the different departments. There is no evidence that personnel or work policies are routinely discussed during the management meetings.

2. Director of Custom Sales Weaver and Marketing and Special Events employee Legazpi Are Not Managerial Employees (Exceptions 1, 2, and 3)

Petitioner argues that the Hearing Officer erred in failing to find that Weaver and Legazpi were managerial employees who should be excluded from the bargaining unit. Petitioner disputes the Hearing Officer's finding that the Petitioner did not properly raise this specific challenge until its closing oral argument. The Petitioner asserts it explored Weaver's managerial status when it questioned Weaver about her job duties during cross-examination. Even Petitioner acknowledged in its Brief that "it may not have been clear that Weaver was in fact a manager," but asserts that the Hearing Officer should have considered Petitioner's managerial argument because the parties never intended to include managers in the stipulated bargaining unit, since the unit expressly excluded "managers."

It is undisputed that Petitioner did not challenge the ballots of Weaver and Legazpi as managerial employees during the election. Petitioner only challenged Legazpi's and Weaver's ballots based on a lack of community interest and challenged Weaver as a statutory supervisor. It is also undisputed that Petitioner did not modify its challenges to these two employees during the post-election procedures prior to the hearing or during its opening statement when the hearing opened. The first time Petitioner alerted the Hearing Officer and the Employer about challenging Weaver and Legazpi as managerial employees was during closing argument. I find that the Hearing Officer correctly refused to consider Weaver and Legazpi as managerial employees in her report because the Petitioner failed to properly raise the managerial issue, thereby preventing the employer with an opportunity to properly litigate the managerial issue.

A party "may raise and litigate at hearing an alternative ground for a properly challenged ballot, even if that alternative ground had not been raised prior to the hearing." *In re Anchor-Harvey Components, LLC*, 352 NLRB 1219, 1220 (2008). Here, the Petitioner has missed the operative word "litigate." Without providing notice of Petitioner's alternate grounds until closing argument after testimony had concluded, the employer was denied the opportunity to fully litigate the managerial issue. It is undisputed that Petitioner did not inform the parties during Weaver's cross examination that it was now asserting that Weaver was not only a statutory supervisor, but in the alternative, a managerial employee. Rather, Petitioner is solely relying on the testimony of Weaver and Legazpi to argue that their managerial status was fully litigated. In other words, the Employer should have known that Petitioner never intended to include Weaver and Legazpi as managers employees solely based on their witness testimony. The Petitioner argues that the Employer could have questioned Weaver on re-direct or recalled Etemadi to clarify Weaver's job duties and thus the Employer had the opportunity to litigate Weaver's managerial status but declined in doing so. I do not find merit to Petitioner's argument.

The Board in *Anchor-Harvey* sustained the challenged ballots and allowed the alternative theory to be raised for the first time during the hearing because they were fully litigated during the hearing. *Id.*; see also *Coco-Cola Bottling of Miami*, 237 NLRB 936 (1976) (alternative ground for challenging the ballot had already been litigated at the hearing with respect to other employees); *CHS, Inc.*, 337 NLRB 514 (2011) (Board reversed Hearing Officer's recommendation and allowed the employer to challenge the eligibility of the same voter after the Union withdrew its challenge because the issue was fully litigated at the hearing and the challenged ballot had remained

unsealed). The Board in *Anchor-Harvey* relied on *J.K. Pulley Co.*, 338 NLRB 1152, 1153 (2003) to find that the union's alternative challenge to three specific ballots were untimely because they were not litigated at the hearing and raised for the first time in the union's post-hearing brief. *Anchor-Harvey*, 352 NLRB 1219, fn. 8. In *J.K. Pulley*, the Board found that the Hearing Officer erred by recommending an alternative theory that was not the basis of the initial challenge, little evidence was presented at hearing, and there was no indication that the hearing officer would consider an alternative theory. *J.K. Pulley Co.*, 338 NLRB 1152, 1153 (2003). As in *J.K. Pulley*, the Hearing Officer in this case would have made the same fatal error if she considered the managerial status of Weaver and Legazpi when the issue was not the basis of the initial challenge, was not fully litigated during the hearing, and thus was not timely raised. The Petitioner also cites *Wells Fargo Alarm Services*, 289 NLRB 562 (1988) to argue that an alternative challenge that was first raised in an employer's brief is appropriate to entertain. *Wells Fargo*, however, is distinguishable from this case because the issue in *Wells Fargo* of whether certain employees in the stipulated unit should be excluded as statutory guards was fully litigated at hearing. In *Wells Fargo*, the parties fully litigated whether guard operators and services technicians should be excluded as statutory guards and thus, the Board found that the same analysis could be applied to lead shift operators, even though the employer initially challenged them as supervisors and not as statutory guards. Here, neither party challenged the ballot of any employee as a managerial employee and thus the managerial issue was never litigated during the hearing. Accordingly, I affirm the Hearing Officer's ruling the Petitioner was precluded from asserting its managerial argument as untimely.

Even assuming arguendo that the managerial argument was properly raised and litigated, Petitioner, who bears the burden of proof, has provided insufficient evidence that Weaver or Legazpi are arguably managers under the Act. The party seeking to exclude individuals as managerial employees bears the burden of proof. *LeMoyne-Owens Colley*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court defined managerial responsibilities that excluded them from the Act:

"Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative decisions of their employer."...These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary."...Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management...Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."

Id. at 682-682 (citations omitted). Here, Petitioner argues that Weaver and Legazpi were so high up in the Employer's management structure that they exercised discretion, even independently, of established Employer policy. There is no evidence of such managerial discretion by either

employee. Weaver reported directly to owners Etemadi and Fischer, who made all the financial decisions on behalf of the Employer. If there was a question of pricing, or whether certain items were too expensive to obtain on custom cakes, Weaver sought approval from either Etemadi or Fischer. Legazpi also sought approval from Etemadi or Fischer if promotional events might be too costly or needed extra items or work.

Petitioner attempts to embellish Weaver's job duties by asserting that she develops, directs and manages the Employer's custom and specialty cake business. Although Weaver meets and interacts with custom cake clients on her own, she regularly consults with Craig before finalizing a design to ensure that Cake Life can make and deliver the cake within the client's prescribed time limits. Weaver does not have the sole discretion to approve custom cake orders without consulting with Craig. There is no evidence that Weaver has the discretion to overrule Craig and order the cake team to produce her design without Craig's approval. Contrary to Petitioner's assertion, these consultations are not sporadic or occasional but are an integral part of the cake team's production process. Weaver works with the cake team from the beginning to the end.

In addition, Weaver and Carreira perform essentially the same duties, minus the Ritz Carlton account. They interact with clients, sketch and design custom cakes, cupcakes or pastry goods to client specifications, work with the cake and pastry team to ensure that Cake Life can deliver the product, and even help in the production of the custom goods. Petitioner argues that Weaver's exclusive handling of the Ritz Carlton account exemplifies her managerial responsibilities. There is no evidence that Weaver solicited and obtained the Ritz Carlton account on behalf of the Employer. To the contrary, Weaver took over handling the existing account from Legazpi. If the Ritz Carlton has a wedding, they refer the client to Weaver. In essence, Ritz Carlton is just another client that Weaver handles similar to the 30-60 other clients she handles with Carreira weekly. There is no evidence that Weaver's handling of the Ritz Carlton account differs from her day to day responsibilities in handling other custom cakes orders.

The Petitioner has even less evidence regarding Legazpi as a managerial employee. Petitioner only cites to Legazpi's attendance at weekly management meetings, her role as the only employee in marketing and sales, and her compensation rate. Petitioner provided no evidence that Legazpi was in charge of making high level management decisions on behalf of the Employer, or used any discretion to make or implement policies on behalf of the Employer. Rather, Legazpi takes photos of Cake Life products to post on social media accounts and promote Cake Life products at special or promotional events. Legazpi also helps with the production of the baked goods working alongside bakers and packaging the finished products. There is no evidence that Legazpi is soliciting new accounts or negotiating business deals on behalf of the Employer at the promotional events. Although she may have some of her own ideas regarding promotions, she mostly does the same promotional events on a regular basis, or around holidays. If she is promoting something different, she checks with Head Pasty Chef Raina Beresniewicz to ensure that the product can be made.

Petitioner argues that Weaver's and Legazpi's attendance at weekly management meetings, compensation rate and exemption from clocking in and out is further evidence of their management status. Attendance at management meetings by Weaver and Legazpi alone does not confer managerial status. Weaver is not a high level manager who could make decisions on behalf of the

Employer. Rather, if Weaver had any issues with the custom cake product, she reported to Etemadi, Fischer, Craig or Beresniewicz. Beresniewicz has even reprimanded Weaver for not providing her the right information on orders. Even though Legazpi may be the only marketing and special events employees, Legazpi also cannot make decisions on her own regarding events. If a promotional or special event required more staff or involved a high cost, she sought approval from Etemadi or Fischer; if the event required special products not normally baked by Cake Life, she reported to Raina Beresniewicz or Rebecca Craig, and coordinated special events with Front House manager Chrissy Tomasco.

As there is no evidence that Weaver or Legazpi are formulating or effectuating high level employer policies or have discretion independent of Cake Life's established policy, I find that they are not managerial employees.

3. Director of Custom Sales Weaver Is Not a Statutory Supervisor (Exceptions 4, 5, and 6)

It is well settled that the party asserting supervisory status bears the burden of establishing it by a preponderance of the evidence. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999). Under the three-prong test set forth in Section 2(11) of the Act, an individual is a supervisor, if: (1) they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, supra.

The Petitioner in its Exceptions contends that Weaver participated in and effectively recommended the hiring of Jessica Carreira and possessed the authority to terminate Carreira, hire Carreira's replacement, responsibly direct Carreira's work, assign Carreira tasks and approve Carreira's time off requests. The Hearing Officer determined that the Petitioner did not meet its burden of establishing that Weaver was a statutory supervisor. I agree. Other than participating in the interview process with owner Etemadi, there is no evidence that Weaver engaged or possessed any of Petitioner's asserted supervisory functions. Weaver's participation in the interview process and recommendation that Carreira be hired is not evidence of an effective recommendation using independent judgement. Etemadi confirmed that it was a joint decision made "in tandem." The evidence must show that the recommendation is undertaken with independent judgment. *Tree-Free Fiber Co.*, 328 NLRB 389, 391-391 (1999) (effective recommendation of discipline not shown where decisions were reached by consensus). There is no evidence that Etemadi would have hired Carreira over Weaver's objection, that Weaver participated in the interview process of any other applicants, or whether Weaver participated in the selection of any applicants to be interviewed, including Carreira.

The Petitioner in its Exceptions further argues that the Hearing Officer erred by not finding that Weaver possessed the authority to terminate Carreira and hire a replacement, to responsibly direct Carreira's work, assign her tasks, and approve her requests for time off. The Petitioner,

however, relies on conclusory statements made by Etemadi regarding what authority he believed Weaver possessed without any detailed, specific evidence of independent judgment to support his conclusion. The Board has made clear that the evidentiary burden is significant and substantial, holding that purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); The Board must not construe the statutory language too broadly because an individual found to be a supervisor is denied the Act's protections. *Avante at Wilson*, supra at 1057; *Oakwood Healthcare*, supra at 687-88 quoting *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995). The party seeking exclusion must demonstrate specific details or circumstances clearly showing that the claimed supervisory authority exists and is not merely paper authority, and that the authority is more than sporadic. *Avante at Wilson*, supra at 1057-58; *Shaw*, supra at 357, fn. 21; *Oakwood Healthcare*, supra at 693; *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001); Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, supra at 1057. Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest Healthcare Center*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); See also *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995). Conclusory statements without specific explanation are not enough. Further, where the evidence conflicts or is inconclusive regarding particular indicia of supervisory authority, the Board will find that a party has not established supervisory status on the basis of those indicia. *The Republican Co.*, 361 NLRB 93, 97 (2014); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003).

There is no evidence that Weaver approved Carreira's cake designs, assigned her any accounts, approved any time off requests, or that Weaver was held accountable for any tasks not performed by Carreira. Instead, she performed the same custom cake work as Carreira minus the Ritz Carlton account. Weaver may have trained Carreira about the custom sales operations when she initially began, but the volume of the custom cake orders necessitated Carreira and Weaver working with each other as a team to meet the orders. I note that Petitioner has not filed exceptions to the Hearing Officer's recommendation to include Carreira in the bargaining unit, and Weaver and Carreira perform essentially the same duties. Both Weaver and Carreira field calls from prospective clients, and they are responsible for handling their own accounts from initial inquiry to final product. Weaver and Carreira coordinate their schedules to ensure ample coverage in the event one of them takes a day off, including responding to client emails by having access to each other's emails and calendars.

Rebecca Craig trained both Weaver and Carreira regarding custom cake design and decorations, including how cakes are produced, so they understand the different types of cakes, buttercream flavors, and how the different cake elements complement each other. The Employer provided them with a pricing "cheat sheet" so both Weaver and Carreira know how much to charge for custom cakes. Throughout the custom cake process, Weaver constantly communicates with Craig over cake designs to ensure that they can provide the product as well as the cake team.

Weaver reported any concerns about Carreira's work directly to Etemadi or Fischer. Weaver would not be involved in any termination decisions without speaking with either Etemadi

or Fischer. In addition, Carreira's conclusory statement that she believed Weaver was her supervisor without any examples or details is insufficient to confer supervisory status, especially when Carreira confirmed that she and Weaver work equally together doing the same job except for the Ritz Carlton account. At most, Weaver participated in an oral evaluation of Carreira with Etemadi one month after she was hired. However, there is no evidence that the evaluation had any effect on Carreira's employment or was ever documented. Carreira herself described the conversation as them giving her feedback regarding the new job.

In its Exceptions, Petitioner asserts that Weaver alone made the decision not to fire Carreira based on another conclusionary statement by Etemadi. In the Fall of 2019, Etemadi told Weaver unexpectedly that she could find somebody to replace Carreira.¹ However, there is no evidence that Weaver considered firing or replacing Carreira. If Weaver had any issues with Carreira's work, she reported it directly to Etemadi or Fischer. This occurred only on two occasions, and Weaver was not involved in the process other than reporting it to the owners. Relaying to a manager reports of inefficiency or faults will not establish supervisory status if they are independently investigated. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965); see also *Ken-Crest Services*, 335 NLRB 777, 778 fn.12 (2001). There is no evidence that any corrective action was taken against Carreira or that Weaver made any recommendations regarding Carreira's work performance. Etemadi confirmed that although he had hoped Weaver would operate as a supervisor, Weaver was not operating as a supervisor due to operational factors and considered her a "supervisor in training." Therefore, in order to meet the demands of the custom cake business, Weaver and Carreira were required to work side by side.

I agree with the Hearing Officer's recommendation that Weaver's title and attendance at weekly management meetings are secondary indicia which by themselves are insufficient to establish supervisory status. If an individual does not possess any one of the several primary indicia for statutory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish statutory status. *J.C. Brock Corp.*, 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 261 NLRB 620 (1982). In addition, secondary or circumstantial indicia cannot establish 2(11) supervisory status where there is insufficient evidence that the individual actually has the authority to perform or effectively recommend one or more of the specific actions listed in that section. See., e.g., *Sam's Club*, 349 NLRB 1007, 1014 (2007); *Webco Industries*, 334 NLRB 608, 610, (2001), enf'd. 90 Fed. Appx. 276, 282 (10th Cir. 2003). Here, there is no evidence that Weaver has exercised or has the authority to perform or recommend one or more of the primary indicia for supervisory status.

¹ Petitioner argues that Weaver chose to not act on her authority by not firing Carreira in the Fall of 2019. In its brief, Petitioner argues that "Weaver testified that, because of the existing workload and the approaching holidays, she decided not to discharge Carreira." However, Petitioner incorrectly characterized Weaver's testimony since Weaver did not make such a statement. Weaver testified that, "There was a time back in the fall where things just weren't going as expected, and then it was just told me like it is your decision if you want to like find anybody else to take Jessica Carreira's spot." There is no evidence that Weaver considered terminating Carreira, or even if she did, that Weaver could make such a decision without speaking with Etemadi or Fischer.

4. Petitioner's Cited Board Cases Are Inapplicable (Exception 7)

In its Exceptions, the Petitioner argues that the Hearing Officer erred in finding that *Fred Meyer Alaska Inc.*, 334 NLRB 646 (2001) and *Pepsi-Cola Co.*, 327 NLRB 1062 (1992) were inapplicable to this case. In *Fred Meyer*, the Board found that individuals who possess a statutory authority defined in Section 2(11) are supervisors and can be held to be supervisors even if the authority has not been exercised. 334 NLRB at 649. The Board determined that a group of meat and seafood managers who did not yet exercise their authority were statutory supervisors because a group of the same classification of employees at another store were found to be supervisors. *Id.* Similarly, in *Pepsi-Cola*, the Board concluded that since all account managers had the same duties and responsibilities, including the authority to discharge, they all possessed the same supervisory authority even though some managers had not yet exercised their authority to discharge.

The Hearing Officer determined that both *Fred Meyer* and *Pepsi-Cola* were inapplicable to this case because there is no indication or proof that another employee in the same classification as Weaver has statutory authority. I agree. The Petitioner would have me confer supervisory authority on Weaver merely because Etemadi said Weaver possessed supervisory authority, including the ability to hire and fire, without providing sufficient evidence of specific instances of Weaver's ability to hire or fire. I have already found that Etemadi's conclusionary statements were insufficient to establish supervisory status. The Board in *Fred Meyer* did not base its decision on conclusory statements but on "sufficient evidence of specific instances of hiring to meet its burden of establishing that the meat and seafood department managers in the Juneau and Fairbanks stores possess the authority to hire and/or make effective recommendations with regard to hiring" similar to the managers in the Anchorage store. 334 NLRB at 649. The Board in *Pepsi-Cola* also relied on specific instances where two account representatives discharged employees in order to find that all account representatives possessed the same supervisory authority to discharge. 327 NLRB at 1063-1064. "Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that such authority actually exists." *Avante At Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (finding employer failed to show that staff nurses possessed supervisory authority, including failing to provide sufficient evidence of participating in grievance-adjustment process). Petitioner also cited *Wal-Mart Stores, Inc.*, 330 NLRB 220 (2002) in support of its Exception but *Wal-Mart* further supports the Hearing Officer's finding.² The Board in *Wal-Mart* refused to confer supervisory status to all the department managers because the evidence failed to show that all the department managers actually possessed uniform supervisory authority. *Id.* at 224-225. In making its determination, the Board in *Wal-Mart* examined the specific duties and responsibilities of the different department managers. I have already determined that Weaver did not effectively recommend hiring Carreira. Other than Etemadi's conclusionary statements, Petitioner has not proffered specific instances that Weaver had the authority to terminate Carreira, hire her replacement, grant her time off, responsibility direct Carreira's work, or assign her tasks.

² Petitioner also cited *Allstate Insurance Co.*, 332 NLRB 759 (2000) to assert that the Board rejected the ALJ's determination that an employee was not a supervisor given the absence of exercise of supervisory authority for three to four years. Petitioner's assertion is incorrect. The Board in *Allstate* found it unnecessary to analyze whether the individual possessed statutory supervisory authority under this analysis and focused on whether the individual's supervisory and managerial status was "in the interest of the employer." *Id.* at 760.

Therefore, there is no evidence that Weaver even possessed let alone exercised any statutory authority defined in Section 2(11) of the Act.

5. Director of Custom Sales Weaver, Marketing and Special Events employee Legazpi and Custom Sales Coordinator Carreira Share a Community of Interest With the Unit (Exception 8)

In its Brief, Petitioner argues that Weaver and Legazpi do not share community of interest with the unit by reasserting the same argument that they are managerial employees, they attend management meetings, and Weaver is a statutory supervisor. Petitioner has not presented any argument or cases opposing the Hearing Officer's recommendation that they share a community of interest under *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002), and they share duties equivalent to "plant clerical" (not office clerical) employees. *Brown & Root, Inc.*, 314 NLRB 19 (1994); *Kroger Co.*, 342 NLRB 202 (2004). Petitioner did not file Exceptions to the Hearing Officer's finding that Jessica Carreira shared a community of interest with the bargaining unit. For the reasons set forth below, I affirm the Hearing Officer's recommendation that Weaver, Legazpi, and Carreira share a community of interest with the bargaining unit.

The Board considers the following factors to determine whether a group shares a community of interest: location of work, skills and training, job functions, interchange, frequency of contact, functional integration, administrative divisions, supervision, terms and conditions of employment and bargaining history. *PCC Structural Inc.*, 365 NLRB No. 160 (2017); *Odwalla Inc.*, 357 NLRB 1608 (2011). Under the traditional community-of-interest test, the Board assesses "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; ... are functionally integrated with the Employer's other employees; have frequent contact with the other employees; interchange with the other employees, have distinct terms and conditions of employment; and are separately supervised." *PCC Structural Inc.*, 365 NLRB No. 160, p. 13.

Weaver, Carreira and Legazpi share similar supervision, wages, benefits and working conditions with the bargaining unit. They are functionally integrated with the unit employees, have frequent contact with the unit employees, and have even performed the work of the unit employees. All three employees have worked in the back of the house performing production work alongside cake and pastry employees. Weaver and Carreira regularly interact and communicate with cake or pastry employees working on their client's cake or pastry designs. Legazpi regularly interacts with pastry employees and baristas to promote Cake Life's products, including the design of cookies, discussing the color or décor, or jumping in to pipe cookies herself. Weaver and Carreira work directly with Head Pastry Chef Rebecca Craig to ensure that Cake Life can produce the cake design. Legazpi works with Head Pastry Chef Raina Beresniewicz and Front-of-House Manager Chrissy Tomasco in order to market Cake Life's bakery and drinks specials. With an all hands on deck approach during busy months, they have all bagged items side by side with baristas or made deliveries with dishwashers.

Petitioner attempts to distinguish Weaver and Legazpi from the unit by asserting that as managerial employees, they are salaried employees with higher wage rate. However, Weaver's wage rate is similar to a production cake manager employee who is in the bargaining unit, and

Legazpi's rate of pay was based on when she performed other duties in addition to marketing, including the custom sales duties and the Ritz Carlton account (which are now handled by Weaver).

As previously stated, Weaver and Carreira share nearly identical responsibilities, except Weaver exclusively handles cake tastings and custom cake designs for the Ritz Carlton. Both Weaver and Carreira meet with clients, sketch and design custom cakes, and consult with Rebecca Craig to ensure that Cake Life can deliver the cake by the requested date. They also perform cake tastings with prospective clients, a task which was shared with Front-of-House Manager Chrissy Tomasco and Barista/Assistant Manager Dominique Gregory (who is included in the unit) until January 2020. Weaver's job functions are intertwined with the cake and pastry team and shares common supervision by reporting to Head Cake Chef Rebecca Craig and Head Pastry Chef Raina Beresniewicz.³ Craig trained Weaver and Carreira on what the cake team can make and produce during different seasons, provided a cheat sheet for quoting cake prices, and provided an understanding of the different cake elements. Weaver constantly consults with Craig and the bakers on the cake team to ensure that Cake Life can produce the requested product and to ensure completion of the design. Weaver herself has performed duties similar to those done by decorators or decorators-in-training by assisting with fondant décor and other specialty cake designs. In fact, Craig relies on Weaver's artistic background and talent, and she is the only person Craig has entrusted to paint on cakes and perform calligraphy. Similarly, Weaver reports to Beresniewicz regarding custom pastry products, and Beresniewicz has verbally disciplined Weaver for failing to provide her with the necessary paperwork to fulfill orders. Weaver handles "cake of the month" special orders, a task also performed by baristas.

Legazpi is the Employer's only Marketing and Special Events employee. However, her prior experience as a pastry chef has been instrumental to Cake Life in the performance of her overall duties. Her previous experience allows her to better promote and market Cake Life's products, especially since Legazpi's duties have also included working in the back-of-house. She also consults with Craig or Beresniewicz to know what cake or pastry items Cake Life can offer for promotion at special events, or with Tomasco for any specialty menu items. Legazpi reports to Etamadi or Fischer for approval for higher priced items, to Craig or Beresniewicz for pastry or cake related items, and to Tomasco for barista related issues. Legazpi has assisted both the cake and pastry teams by making batters, scooping cupcakes, making whipped cream, turned out cheesecakes and flourless pies, and performed fondant work.

Although Weaver, Carreira and Legazpi spend a fair amount of time in the office to perform their respective custom cake and marketing and sales duties, they could not perform their jobs without interacting with the baristas, pastry and cake employees. Weaver and Carreira cannot succeed in their jobs without communicating with the head baker or the bakers. Legazpi also cannot market Cake Life's products without interacting with the employees who produce them. The Employer is a small operation with an "all hands on deck" approach, especially during the busy "Hallmark" holiday season. As such, Weaver, Carreira and Legazpi have performed the same duties as other members in the bargaining unit by packing or bagging items, making deliveries,

³ I note that the Petitioner did not file exceptions to the Hearing Officer's finding that Weaver is supervised by owners Etamadi and Fischer as well as Head Cake Chef Craig and Head Pastry Beresniewicz.

assisting with cake decorating, or assisting with tablescapes in front-of-the house. Legazpi has assisted with seasonal décor in the front-of-the-house or answered phone calls when the baristas are busy.

Accordingly, I affirm and adopt the Hearing Officer's recommendation that Weaver, Carreira and Legazpi share a community of interest with the unit in their respective roles in Custom Program and Marketing and Special Events and their other duties and responsibilities at the Employer's facility. Regardless of what classification they hold, they are functionally integrated with the unit and cannot perform their duties or responsibilities without the included cake team, pastry team and baristas.

6. Petitioner's Motion to Exclude Was Properly Overruled (Exception 9)

Prior to the hearing on February 20, 2020, Petitioner filed a Motion to Preclude the Employer from presenting certain evidence in support of its position on election challenges. In her report, the Hearing Officer overruled the Motion to Preclude citing that Section 102.69(a) of the Board's Rules and Regulations clearly provides that other parties are not entitled to receive copies of offers of proof concerning objections. I agree with the Hearing Officer's finding to overrule Petitioner's Motion to Exclude, but on different grounds.

After the election, the Employer filed a Position Statement regarding its voter ballot challenges to Gregory and Johnson along with its supporting evidence to the Regional Director. The Employer served Petitioner with a copy of the Position Statement but did not provide a copy of its exhibits (or offers of proof) at the same time. The Petitioner filed its Position Statement supporting its ballot challenges to Weaver, Carreira and Legazpi along with its Objections to the Regional Director.

In its Motion, Petitioner asserts that the Employer failed to comply with the Board's Rules and Regulations by failing to serve a copy of the 17 exhibits attached to the Position Statement in Support of the Employer's Election Challenges filed originally with the Regional Director. Petitioner asserts that the Employer was required to serve the exhibits along with the position statement to the Petitioner at the same time. On February 20, 2020, the Employer filed its Opposition to Petitioner's Motion to Exclude and Cross motion to Preclude the Union's Objections to Pre-Election and Election Conduct as Untimely.⁴ The Employer argued that the Petitioner was not served a copy of its Offers of Proof (or the attached Exhibits) because they were not entitled to the documents pursuant to the Board's Rules and Regulations. The Employer further argued that the Petitioner was not prejudiced since the Employer provided Petitioner with a copy of all of the Offers of Proof in addition to other documents in response to Petitioner's subpoena prior to the hearing. Neither party was prevented from presenting any evidence during the hearing due to Petitioner's Motion.

In its Exceptions, the Petitioner asserts that the Hearing Officer erred by finding that the Board's Rules and Regulation allowed the Employer to serve a redacted statement of position to

⁴ Since no exceptions were filed over the Hearing Officer's finding to overrule the Employer's Cross Motion, I affirm the Hearing Officer's ruling on the Cross-Motion.

the Petitioner. Petitioner argues that the Hearing Officer misinterpreted the Board's Rules and Regulations since Section 102.69(a)(8) only references statements in support of "objections," not challenges. Therefore, the Petitioner argues that the Employer's Offers of Proof in support of Challenges were not excused from service to the other party under Section 102.69(a)(8) and a complete set of documents should have been served under Section 102.5(f) referring to service of documents filed with the Regional Director. The Employer, on the other hand, argues that Section 102.69 applies equally to offers of proof in support of both objections and challenges since both objections and challenges affect the outcome of an election.⁵

Section 102.69(a)(8) states in pertinent part:

"Within 5 business dates after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in Section 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections...The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof."

Although Section 102.69(a) does reference offers of proof with objections, Petitioner has not cited any specific rule or regulation requiring any party to serve offers of proofs to either party when objections or election challenges are filed. The Petitioner only argues that position statements on election challenges fall under the same service requirement under Section 102.5(f).⁶

Here, the Employer provided its Position Statement regarding its voter ballot challenges to Gregory and Johnson along with its evidence in support of its position to the Regional Director. Petitioner also filed its Position Statement supporting its ballot challenges to Weaver, Carreira and Legazpi along with its Objections to the Regional Director. Section 11363.1 of the Board's Case Handling Manual specifically states that the "regional director is authorized to process challenges administratively or by a hearing...the regional director should evaluate the challenge and the parties' positions and supporting evidence to determine if the evidence 'raises substantial and material factual issues.'" See also Section 11363 (Procedures Applicable to Challenges). There is nothing in Section 11363 requiring any party to serve exhibits or offers of proof in support of

⁵ Section 102.69(a)(6) specifically references challenges by stating "Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded."

⁶ Section 102.5(f) states in pertinent part: "Service. Unless otherwise specified, documents filed with the Agency must be simultaneously served on the other parties to the case, as appropriate, the Regional Office in charge of the case."

challenged ballots on the other side. Section 11363 has no service requirement for exhibits or offers of proof in support of ballot challenges unlike Section 11392.9 in the Board's Casehandling Manual regarding service of objections to all other parties. In the absence of a service requirement, Petitioner would like me to apply Section 102.5(f) to all position statements and exhibits indiscriminately. However, I cannot impose a service requirement when none exists.

Even assuming *arguendo* that the Employer should have simultaneously served the exhibits to the Petitioner when it served its position statement, the Petitioner was not prejudiced by the lack of service. Petitioner received copies of the all the exhibits prior to the hearing and both the Petitioner and the Employer had the opportunity to use the documents during the hearing.

7. Pastry Chef Johnson and Assistant Manager/Barista Gregory are not statutory supervisors

The Employer challenged the ballots of Pastry Chef Johnson and Assistant Manager/Barista Gregory as statutory supervisors. In her report, the Hearing Officer determined that they were not statutory supervisors and recommended that their challenged ballots be opened. No Exceptions were filed to the Hearing Officer's findings, and I affirm and adopt the Hearing Officer's findings and recommendations. The record evidence supports her finding that Johnson did not exercise any statutory authority, did not responsibly direct or assign work with independent judgement, did not effectively recommend that a former employee be discharged and did not have the authority to approve overtime. The record evidence also supports her findings that Gregory did not have the authority to effectively recommend hiring employees, did not responsibly direct or assign work to employees with independent judgment, and that some of Gregory's duties and responsibilities were routine and clerical in nature without needing independent judgement. Although the Hearing Officer did not specifically find that Gregory also did not have the authority to address employee behavior or effectively recommend discipline, the record evidence showed that Gregory did not have such authority. Rather, Gregory reported any issues with employees to Front House Manager Chrissy Tomasco. Other than reporting, Gregory did not have any involvement in disciplinary actions, and Tomasco made the decision to issue any employee disciplines. *See Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965) (relaying to a manager reports of inefficiency or faults will not establish supervisory status if they are independently investigated).

8. Objections

Neither party filed Exceptions to the Hearing Officer's findings and recommendations to overrule Petitioner's Objection 1 and sustain Objection 2. I agree with the Hearing Officer's findings and adopt her findings and recommendations regarding both Objections. Petitioner's Objection 1 stated that during the critical period on the date of the election while polls were open, Counsel for the Employer entered the polling area in front of at least one employee who had not yet voted, notwithstanding that she was not permitted to be there. The record evidence supports the Hearing Officer's findings that the Employer's counsel's brief and inconsequential presence in the voting area did not adversely affect the laboratory conditions of the election. *American Display Mfg.*, 259 NLRB 21, 31, (1981). There was no evidence that employees were unable to vote, believed they were being surveilled, or changed their vote due to the Employer's counsel's

brief presence outside of the polling area while the polls were open. There was also no evidence that the Employer's counsel engaged in any electioneering or had any conversations with voters who had not yet voted.

I also agree with the Hearing Officer's findings to sustain Objection 2 and adopt her findings and recommendations. Petitioner's Objection 2 states that during the critical period in the morning of January 21, 2020, during a non-mandatory meeting, the Employer informed employees of a Paid Time Off policy (PTO) that the Employer had prepared but could not implement because of the Petitioner's petition. The Employer did not present any witness to rebut the testimony of the six witnesses proffered by Petitioner. The record evidence supports the Hearings Officer's findings that PTO was a central point of the Union's campaign and especially impacted the employees who lacked PTO (the baristas in this case) and those with PTO who sympathized with their colleagues. Among the 20 employees who attended the non-mandatory meeting on January 21, 2020, nine out of the ten baristas attended. PTO was discussed at least twice during this meeting. Etemadi informed employees that the Employer had a PTO policy ready to implement that was in full compliance with Philadelphia's local ordinance (referred to as Philadelphia Code Chapter 9-4100) but it could not be implemented until after the election. Etemadi made the announcement in conjunction with his speech where he commented that having a union could make things better, worse or remain the same. Etemadi did not explain how the Employer would comply with the Code but it would be assumed that all employees (including baristas who had no PTO) would get at least one hour of paid sick leave for every 40 hours worked in Philadelphia. During the meeting, PTO was again addressed in response to a barista's frustration of the Employer's lack of PTO policy in contrast to other businesses. By not proffering any witnesses, the Employer failed to rebut the inference that the announcement or the timing of the announcement was objectionable. In doing so, the Employer, the party with the burden of proof, failed to provide a legitimate business justification for announcing a new PTO policy that would grant benefits to employees 26 hours before the scheduled election. *Sun Mart Foods*, 341 NLRB 161, 164 (2004)

For these reasons, I adopt and affirm the Hearing Officer's recommendation to overrule Objection 1 and sustain Objection 2.

ORDER

In sum, the evidence supports the Hearing Officer's conclusions that Weaver, Gregory and Johnson are not statutory supervisors and that Weaver, Legazpi and Carreira share a community of interest with the bargaining unit. Accordingly, I overrule the Petitioner's challenges to Weaver, Legazpi and Carreira and the Employer's challenges to Johnson and Gregory. IT IS HEREBY ORDERED that the ballots of Chloe Weaver, Kathryn Legazpi, Jessica Carreira, Anaya Johnson and Dominique Gregory be opened and counted, and that a revised Tally of Ballots issue.

The evidence also supports the Hearing Officer's conclusion that Objection 1 be overruled but that Objection 2 be sustained. Accordingly, if the revised Tally of Ballots shows a majority of ballots cast for Petitioner, I ORDER that the Petitioner be certified as the exclusive bargaining representative for the appropriate unit. In the alternative, if the revised Tally of Ballots shows that the Petitioner did not receive a majority of ballots counted, I ORDER that the January 22, 2020 election be set aside, and a rerun election be conducted.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.69 (c) (2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. The request for review must conform with the requirements of Sections 102.67 (e) and (i)(I) of the Board's Rules and must be received by the Board in Washington by **October 2, 2020**. If no request for review is filed, the decision will be final and shall have the same effect as if issued by the Board.

A request for review must be E-filed through the Agency's website. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the undersigned. A certification of service must be filed with the Board together with the request for review.

Dated at Philadelphia, Pennsylvania this 18th day of September, 2020.



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